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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

LIEN PING CHEN, Plaintiff and Respondent, v. JOHNSON SU, Defendant and Appellant.	B166710 (Los Angeles County Super. Ct. No. BC222838)

Appeal from a judgment of the Superior Court of Los Angeles County. Barbara Meiers, Judge. Appeals of Timothy Su and John Su dismissed. Judgment affirmed.

Stephen J. Kennedy for Johnson Su, Defendant and Appellant.

Timothy Mark Su, in pro per, for Defendant and Appellant.

John Fa Su, in pro per, for Defendant and Appellant

Daniel Noel Su, in pro per, for Defendant and Appellant.

Lively & Ackerman and Richard D. Ackerman; Maxwell E. Lin & Associates and Maxwell E. Lin for Plaintiff and Respondent.

This appeal by the defendants in this case presents a variety of issues. Some of the issues concern the trial court's award of attorney's fees and costs. Another issue concerns whether a compromise and settlement agreement entered into in a prior case should be enforced in this suit. Also at issue is the trial court's adjudication of the defendants' interests in a corporation. While we find that the trial court erred in not awarding appellate costs to one of the defendants pursuant to our directives in earlier appeals in this case, we conclude it is not reversible error. Additionally, we find that the appeals filed by two of the defendants must be dismissed because their defaults were taken and they have no standing to challenge the judgment. The judgment will be affirmed both in its affirmative relief and in its award of attorney's fees and costs to plaintiff.

BACKGROUND OF THE CASE

1. *Prior Appeals in the Case*

This case has been before us on previous occasions. In an opinion filed November 6, 2002, we directed the trial court to vacate an August 20, 2001 judgment because it was not signed by the judge who conducted the trial and there was no indication that she had not been available to sign it. We further directed the court to either hold hearings on a final statement of decision, or conduct a new trial if necessary. In a second appeal, we held that our original decision necessitated a reversal of an order on a motion to tax costs and a motion for attorney's fees. Our prior opinions did not address the substantive merits of the original judgment entered by the trial court.

After the case was returned to the trial court, the court issued three judgments—a March 18, 2003 "final judgment" which was made effective nunc pro tunc to the date of the court's original/vacated judgment, an "amended final judgment," and a "second amended final judgment which was made effective nunc pro tunc to March 18, 2003. Appeals were filed, and issues regarding the substantive merits of the judgment are now squarely before us.

2. *Nature of This Suit*

This case concerns a compromise and settlement agreement entered into in a suit in Alameda County. The agreement was between plaintiff Lien Ping Chen ("plaintiff") and one of the defendants in the instant suit—Johnson Su. The other defendants are John Su, Timothy Su, Daniel Su, and S.U. Group, Inc. Plaintiff contends Johnson Su breached the agreement.[1]

In the Alameda action, plaintiff sued Johnson Su and John Su. The January 22, 1999 judgment in that case concerns a "short form deed of trust and assignment of rents" (dated November 7, 1994 and recorded as instrument number 94353702 on that same day). The document lists LBC Development Corporation as the trustor, Eric Yen as the trustee, and plaintiff as the beneficiary. The document states it was given to secure a promissory note of $7 million. The Alameda judgment declares plaintiff to be the sole

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[1] According to plaintiff, Johnson Su is the father of Daniel Su and Timothy Su, and the brother of John Su. Additionally, the record shows that the corporate defendant, S.U. Group, Inc., filed a certificate of dissolution on July 31, 2000 with the secretary of state's office, and that Johnson and John Su were a majority of its directors.

beneficiary of that short form deed of trust and assignment of rents. Additionally, the Alameda judgment sets aside and declares null and void an "assignment of deed of trust" (recorded as instrument number 96099358 on April 23, 1996). That assignment of deed of trust was signed by plaintiff as assignor with defendant John Su as the assignee, and the interest assigned was the beneficial interest in the short form deed of trust and assignment of rents. Plaintiff asserted in the Alameda suit that he was tricked into signing the assignment.

The compromise and settlement agreement in that suit, which was entered into by plaintiff and Johnson Su on January 22, 1999, recites that plaintiff *alleged* in the Alameda action that he is the sole shareholder of LBC Development Corporation which owns approximately 183 acres of real property in the City of Livermore in Alameda County, and he entrusted Johnson Su with the management of the daily affairs of LBC, but did not authorize or empower him to transfer any interest in LBC to anyone, and Johnson Su violated the trust placed in him and such violation caused plaintiff to file the Alameda County action to have the court set aside the assignment of the short form deed of trust and assignment of rents. As part of the compromise and settlement agreement, Johnson Su agreed he would not do anything or execute any documents on behalf of plaintiff, LBC or John Su which could or would cause legal detriment or prejudice to plaintiff or LBC.

The compromise and settlement agreement did not resolve ownership of the 183 acres in Livermore, and the complaint in the instant suit does not explicitly seek a declaration of who owns the 183 acres. The complaint alleges that on October 4, 1999,

Johnson Su improperly substituted Daniel Su as trustee of the short form deed of trust and assignment of rents in place and stead of Eric Yen, and on October 8, 1999, Daniel Su fraudulently and illegally executed a full reconveyance and had it recorded.

3. *Post-Appeal Activities in the Trial Court*

a. *The Judgments and the Initial Post-Appeal Motions*

In our opinion directing the trial judge to vacate her original (August 20, 2001) judgment, we stated that she must then either hold a hearing on the Sus' objections to her July 17, 2001 document entitled "tentative decision, tentative statement of decision and tentative judgment," or retry the case if she was no longer able to decide the objections. After vacating the judgment, the trial court set a hearing for March 6, 2003 to address "any and all matters between the parties." The court directed the parties to set their new motions, if any, for that day, and ordered that they not file any additional papers on matters that were previously in issue and before the trial court for hearing.

Plaintiff moved to have the trial court sign a judgment based on the court's "tentative decision, tentative statement of decision and tentative judgment." Defendants opposed such motion

Defendant Johnson Su noticed a motion for an award of attorney's fees on appeal, which plaintiff opposed. The motion was based on our award, in our original opinion, of costs on appeal to the defendants. He also moved for leave to amend his answer in the instant case and file a cross-complaint, which plaintiff opposed. The cross-complaint and amendment to the answer would address Johnson Su's assertion that it was through extrinsic fraud or mistake that he signed the compromise and settlement agreement in the

Alameda case because it was not the one to which he and his attorney had agreed and it was only signed because plaintiff's attorney told Johnson Su's appearance attorney that it was the correct agreement. (According to Johnson Su's moving papers, about eight months after the compromise and settlement agreement had been signed, his attorney filed a motion to vacate the agreement and admitted that it had been a mistake to sign the agreement, but the Alameda court "denied the motion for relief as untimely (and perhaps on the merits as well)."

On March 6, the court heard arguments on the various matters presented by the parties and took them under submission. The court's minute order states this hearing included "all matters referred back to the trial courts [sic] by the Appellate Court." On March 18, 2003, the court ruled the defendants' motions were premature since defendants were seeking to have the court readdress the merits of the case but they had not made a Code of Civil Procedure section 473 motion or moved for a new trial. The court set May 14, 2003 as the day for hearing such motions and motions regarding attorney's fees, and it issued a "final judgment," effective nunc pro tunc to August 20, 2001, the date of the judgment that we ordered vacated.

The judgment, which is virtually identical in its content to the vacated August 20, 2001 judgment, recited that since a time prior to January 22, 1999 (the date of the judgment in the Alameda case), plaintiff has been the sole beneficiary of the short form deed of trust and assignment of rents dated and recorded on November 7, 1994, and further stated that any and all purported assignments of that short form deed of trust and assignment of rents that were recorded thereafter are declared to be null and void, as are

"any other forms of transfer of title or interest in the [November 7, 1994] short form deed of trust and assignment of rents." "Additionally, all other documents purported to create any new or different Deeds of Trust on [property described in exhibit A to the final judgment, which exhibit is incorporated by reference into the judgment], are all found and declared to be null and void, including but not limited to" instruments specifically described in the judgment, some of which were executed after the judgment in the Alameda case, and all of which were signed by one of the defendants.

The final judgment also declared that defendants "have no bona fide relationship whatsoever with LBC Development Corporation or right, title or interest, legal or beneficial in that real property as to which the legal description is provided above, and, accordingly, have no right or ability to act for or convey and [sic] interest in or on behalf of that corporation or in or for the land in question [and t]hey further have no right or entitlement to act in any way for plaintiff in this case." The judgment enjoined the defendants from claiming any interest in such real property, documents relating to the real property, and LBC Development Corporation.

On March 18, 2003, the court also issued an amended final judgment. It differed from the final judgment in that it included three additional specified documents involving defendants, two signed by Johnson Su and one by John Su, which the court adjudicated were also null and void.[2]

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[2] In a May 29, 2003 ruling on pending motions, the court noted that despite language in the compromise and settlement agreement signed by Johnson Su that he would not do anything, including executing documents, that could or would cause legal

b. *Post-Judgment Papers*

Johnson Su filed a motion for a new trial or alternatively to have the final judgment and amended final judgment vacated and a new and different judgment entered, and he renewed his motion for leave to amend his answer and file a cross-complaint. He asserted the trial court should "reconsider its factual finding that [he] defrauded plaintiff in connection with the assignment of the deed of trust" and the court should reopen the case, permit him to file a cross-complaint and amend his answer, and then retry the case. Plaintiff and Johnson Su also filed additional papers regarding attorney's fees and costs. These matters were heard on May 14, 2003 and taken under submission, and the court issued its ruling on May 29, and a clarification of that ruling on June 11, 2003.

Addressing Johnson Su's motion for a new trial or new judgment, the court, in its May 29 "ruling on pending matters,"[3] determined it would modify the March 18, 2003 amended final judgment (by interlineations) in a limited manner "to eliminate certain language which suggests that this court has permanently resolved all issues with respect to ownership claims relating to the . . . underlying real estate in issue. . . . [T]he court has recognized that the language of the judgment and . . . therefore its scope, exceeds what is properly before this court." The court stated that because the subject property, the 183

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detriment or prejudice to plaintiff or LBC Development Corporation, Johnson Su continued his "mischief" by continuing to act as a purported vice president of LBC long after such a relationship had ceased to exist, and by indirectly affecting trust documents by creating " 'on behalf of LBC' "new trustees and re-conveyances.

[3] The May 29, 2003 ruling on pending matters was amended in certain respects for clarification by minute order dated June 11, 2003.

acres in Livermore, is in Alameda County, a decision quieting title to it "should if not must" be made in that county, and "claims with respect to interests in the property itself have not been fully litigated in the present action (and could not have been in the posture of the pleadings without changing the causes of action, as well as due to the in rem nature of a quiet title action and its proper situs in Alameda)." On that basis, the court vacated the amended final judgment of March 18, 2003 and issued a "second amended final judgment" effective nunc pro tunc as of March 18, 2003.

As for Johnson Su's motion for leave to amend his answer and file a cross-complaint, the court ruled the motion was moot since a judgment had already been rendered and the court was not granting his motion to vacate the judgment in its entirety or his motion for a new trial.

c. *The Second Amended Judgment*

In modifying, by interlineations, the March 18 amended final judgment to produce the "second amended final judgment," the court retained its adjudication regarding the recorded documents respecting the short form deed of trust and assignment of rents, and essentially deleted language which decreed that defendants have no right, title or interest, legal or beneficial, in the 183 acres of real property in Livermore, thus leaving the issue of defendants' interest in the land to the court in Alameda County.[4]

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[4] The parties are now once again engaged in litigation in Alameda County over the 183 acres in Livermore. In that second suit in Alameda, Johnson Su has sued plaintiff and others for declaratory relief, quiet title, enforcement of equity of redemption, and damages, contending that two deeds conveying a total 100 percent interest in the property to LBC Corporation were actually only a mortgage created in favor of LBC.

4. *The Court's Rulings on the Requests for Attorney's Fees*

In its May 29, 2003 ruling on pending motions, the court made reference to its July 17, 2001 tentative statement of decision which it observed had become its final statement of decision. The statement of decision states the court found "all facts and claims in favor of the plaintiff," and further found plaintiff's witnesses to be credible and the defense to not be credible. It found the settlement agreement was breached by Johnson Su and therefore he is liable for the attorney's fees plaintiff incurred to enforce such agreement.

That agreement provides in part: "In the event of any litigation between the parties regarding the construction, effect or validity of the terms of this Agreement, the prevailing party shall be entitled to recover court costs and attorney's fees. In addition, the prevailing party shall be entitled to said party's out-of-pocket court costs and attorney's fees incurred post-judgment by way of enforcement or execution of any such judgment. Such costs and fees or an award therefore shall not be merged into or become part of the underlying judgment, but shall remain a separate and distinct obligation of the non-prevailing party." Johnson Su does not dispute the trial court's finding that plaintiff is the prevailing party for purposes of the attorney's fees provision in the compromise and settlement agreement.

The court awarded plaintiff costs of $5,661.80 against all defendants, and attorney's fees of $70,743.50 against Johnson Su, the sole defendant who entered into the compromise and settlement agreement with plaintiff. It denied Johnson Su's request for

attorney's fees and costs on appeal, which Su based on the outcome of the first two appeals.

ISSUES ON APPEAL

The issues in this appeal include whether the trial court's rulings on fees and costs are proper, whether the compromise and settlement agreement should even be enforced, whether this court should "determine the scope" of the second amended final judgment, whether Timothy and John Su have standing to appeal from that operative judgment, and whether the appellants who are proceeding inpropria persona submitted acceptable briefs.

DISCUSSION

1. *Johnson Su's Challenge to the Trial Court's Determination of Attorney's Fees and Costs*

The correct application to this case, of statutory and case authority respecting awards of attorney's fees, presents a question of law, which we address de novo. (*Akins* v. *Enterprise Rent-A-Car Co*. (2000) 79 Cal.App.4th 1127, 1132-1133.) Johnson Su questions plaintiff's claim, and the trial court's award, of fees and costs for plaintiff's post-original judgment efforts, including plaintiff's appellate fees and costs, and his post-appeal fees and costs. While we find there is merit to one of the many arguments Johnson Su presents, we also find that the trial court has already resolved the problem, although unintentionally, and there is no need to reverse or amend the judgment.

a. *Cost Awards in Interim Rulings*

A successful party in a mandamus proceeding can be awarded costs under Code of Civil Procedure section 1095 (*Union Trust Co*. v. *Superior Court* 13 Cal.2d 541, 543), just as a party can be awarded costs on appeal (Code Civ. Proc. § 1034, Cal. Rules of Court, rule 27 (a)). California Rules of Court, rule 27 (c) sets out the types of costs that may be recovered by a party who prevails in an appeal. We awarded the non-defaulting defendants (Daniel Su and Johnson Su) their costs in the two previous appeals—the appeals that we treated as petitions for writ of mandate, and Johnson Su's appeal from the trial court's original order on fees and costs.

When an award for costs on appeal is an interim ruling (that is, where the appeals court does not decide who wins the case but rather remands the case for further proceedings in the trial court), and the case involves a contract with an attorney's fees provision, such interim cost award can not include attorney's fees because under Civil Code section 1717, contractual attorney's fees are awarded to the prevailing party in a suit, and the prevailing party is not known until the suit is concluded. Section 1717 ties attorney's fees awards to prevailing party status, not to cost awards.

Thus, in an interim appeal a party may be awarded his or her costs by the appellate court, but the issue of attorney's fees is not addressed by the trial court until that court determines who ultimately prevailed in the lawsuit. (*Mustachio* v. *Great Western Bank* (1996) 48 Cal.App.4th 1145, 1149-1150; *Snyder* v. *Marcus & Millichap* (1996) 46 Cal.App.4th 1099, 1102 et seq.) Similarly, a party who prevails on a discovery motion in the trial court might recover its costs incurred for such motion, but will be entitled to

contractual attorney's fees incurred for the motion only if he or she is determined to be the ultimate prevailing party.

b. *Attorney's Fees*

Once the prevailing party status is determined for Civil Code section 1717 contractual attorney's fees purposes, that party is entitled to recover all attorney's fees he or she incurred, without an offset for the fees incurred by another party on an interim matter, such as a discovery motion or an appeal, where that other party prevailed on the interim matter. (*Presley of Southern California* v. *Whelan* (1983) 146 Cal.App.3d 959, 961-963; *Snyder* v. *Marcus & Millichap*, *supra*, 46 Cal.App.4th at p. 1103.) Thus, for example, "[a] plaintiff who succeeds in having a summary judgment against him reversed and then goes on to prevail at trial is, of course, entitled to the fees he incurred on appeal [citation]. Where, however, the defendant ultimately prevails, he is entitled to his fees on appeal without offset based on the fees plaintiff incurred on appeal." (*Presley*, at p. 963.)

Johnson Su mentions that on remand, the trial court actually limited the scope of relief that had been awarded to plaintiff in the original judgment, and asks whether plaintiff can nevertheless recover attorney's fees for the additional services his attorney performed after remand. The answer is "yes." As we have explained, in determining an amount of attorney's fees, the issue is not whether the non-prevailing party prevailed on some piecemeal issues during the litigation. Moreover, the scope of the second amended final judgment was not the only matter presented to the trial court on remand. For example, plaintiff defended against Johnson Su's motions for vacating the judgment and new trial, and for leave to amend his answer and file a cross-complaint.

c. *The Trial Court's Determination of Appellate Fees and Costs for Johnson and Daniel Su*

The trial court's May 29, 2003 ruling states that the court denied defendants costs and attorney's fees for their efforts in the prior appeals. Given that the court determined plaintiff is the prevailing party in this action, denial of attorney's fees necessarily flowed from that determination.[5] However, because the non-defaulting defendants (Daniel Su and Johnson Su) were awarded their costs on appeal in our two earlier reviews of matters in this case, the trial court should have awarded them the rule 27 (c) (1) costs that they could prove. Nevertheless, because Daniel Su has not raised this as an issue, we find no need to address the matter further as to him.

As for Johnson Su, the trial court, as discussed below, adjusted its award of attorney's fees to plaintiff in the amount of $6,000 based on the fact that Johnson Su prevailed over plaintiff in his prior appeals. Given that such an adjustment was not necessary (*Presley of Southern California* v. *Whelan*, *supra*, 146 Cal.App.3d at pp. 961-963; *Snyder* v. *Marcus & Millichap*, *supra*, 46 Cal.App.4th at p. 1103), and given that Johnson Su's claimed costs amounted to $2,676.94 (filing fee, preparation of appellate record, and printing of his briefs), there is no reason to send this back to the trial court for a determination of his reasonable appellate costs. Johnson Su is ahead.[6]

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[5] As noted above, the trial court determined Johnson Su breached the compromise and settlement agreement and plaintiff was therefore entitled to attorney's fees under the fees provision of that agreement.

[6] The court actually made two adjustments to the amount of fees it awarded to plaintiff. It determined that because the matter of the wrong judge signing the original

d. *The Fees and Costs Awarded to Plaintiff*

Once it is determined that a party is entitled to an award of attorney's fees, the amount of the award is left to the trial court's sound discretion since it is the trial judge who is in the best position to evaluate the legal services rendered by the attorneys. The trial court's determination of a proper amount of fees to be awarded will not be disturbed on appeal unless the award clearly constitutes an abuse of discretion. (*Vella* v. *Hudgins* (1984) 151 Cal.App.3d 515, 522-524.) " 'Discretion is abused whenever, in its exercise, the court exceeds the bounds of reason, all of the circumstances before it being considered. The burden is on the party complaining to establish an abuse of discretion, and unless a clear case of abuse is shown and unless there has been a miscarriage of justice a reviewing court will not substitute its opinion and thereby divest the trial court of its discretionary power.' " (*Denham* v. *Superior Court* (1970) 2 Cal.3d 557, 566.) Thus, whether this court or any other court would have awarded plaintiff more fees or

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judgment could have been handled in a much less expensive manner, such as by bringing it to the trial court's attention or by initially bringing a writ petition to this court rather than filing an appeal, $6,000 would be deducted from the attorney's fees that it would otherwise have awarded to plaintiff. The court indicated its belief that $6,000 would have been the reasonable fees for dealing with the signature problem in the trial court or by petition for writ of mandate to this court, and this figure "reflect[s] a consideration of the attorney's fees expended by defendant on appeal." The court noted that nevertheless, it did allow plaintiff "some of his fees on appeal." The court also indicated that it made an adjustment in fees "in connection with the ultimate modification [(in defendant's favor)], of the judgment," but that this was done "with consideration of all of the grounds [put forward by Johnson Su for new trial or vacation of the judgment] not accepted." Plaintiff has not appealed these adjustments to his attorney's fees and we discuss them no further.

less fees is not the relevant question; the relevant question is whether there was an abuse of discretion in the amount that was actually awarded.

"[S]ection 425.16 permits the use of the so-called lodestar adjustment method" of fixing attorney's fees awards. (*Ketchum* v. *Moses* (2001) 24 Cal.4th 1122, 1131.) The court first fixes the lodestar or touchstone figure, which is based on the number of hours reasonably expended by the attorney (including those devoted to the motion for fees), multiplied by a reasonable hourly rate.[7] (*Id*. at pp. 1131-1136.) The court must carefully review the attorney's documentation for the number of hours claimed, to avoid awarding fees for padded claims. (*Id*. at p. 1132.) The *Ketchum* court defined padding as including duplicative and inefficient efforts (*ibid*.); we add irrelevant efforts. After the court has the lodestar, it may adjust that figure based on various factors specific to the case. (*Ibid*.; *PLCM Group, Inc*. v. *Drexler* (2000) 22 Cal.4th 1084, 1095 [a Civ. Code, § 1717 case].) These other factors include, for example, the nature, novelty and difficulty of the litigation, the skill required to handle it and the skill employed by the attorney, the attention given to the case, the success or failure of the party seeking the fees, the amount at stake in the case, the extent to which the nature of the litigation precluded the attorney from handling other cases, the contingent nature of the fee award, and other circumstances of the case. (*Ketchum*, at p. 1132; *PLCM Group, Inc*., at p. 1096.)

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[7] The reasonable hourly rate is the prevailing rate in the community for private attorneys for similar work who bill for it on a noncontingent basis. (*Ketchum* v. *Moses*, *supra*, 24 Cal.4th at p. 1133.)

The trial court is not bound by the evidence submitted by an attorney in support of a motion for fees. (*Vella* v. *Hudgins*, *supra*, 151 Cal.App.3d at p. 524.) The court may consider its own expertise in the value of legal services when it decides what a reasonable award would be; moreover, expert testimony on the issue of fees is not required. (*PLCM Group, Inc*. v. *Drexler*, *supra*, 22 Cal.4th at p. 1096; *Vella* v. *Hudgins*, at p. 524.)

Here, the court found that the fees and costs claimed by plaintiff "are virtually completely reasonable, and at reasonable rates and in keeping with the work done and the difficulty of the case, noting also the conservative use of 5 minute billing periods, which tends to restrict overbilling of time." The court stated it "considered all other standards for the award of attorney's fees and finds the fees awarded to be reasonable under all standards to be applied." Absent sufficient reason presented by Johnson Su to question the trial court's analysis, and he has presented none, we will not disturb the court's determination.

2. *Johnson Su Has Not Presented a Case for New Trial*

Although Johnson Su asserts in his opening brief that he is appealing from the second amended judgment "only insofar as it awards attorney's fees . . . to [plaintiff]," and repeats that assertion in a document in the pending Alameda County case that he filed, much of his brief is devoted to an assertion that the compromise and settlement agreement should not be enforced because it was not the compromise and settlement agreement that the attorney who represented him in the original Alameda County suit, Mr. Kass, believed should be signed. He asserts that Mr. Kass and the attorney who

represented plaintiff in that suit each drafted a compromise and settlement agreement, and on the day of trial, Kass sent a contract attorney to represent him, and plaintiff's attorney told this stand-in attorney that Kass had approved the agreement drafted by plaintiff's lawyer, and on that basis, he (Johnson Su) and the contract attorney signed the agreement presented to them by plaintiff's attorney.

Johnson Su further asserts that although attorney Kass soon realized the mistake, Kass waited seven months to file a motion to vacate the agreement and the Alameda County court denied the motion as untimely. In his brief, he asserts the denial of relief was without prejudice to his other remedies such as rescission of the agreement, because the motion to vacate the agreement did not fit within the parameters of Code of Civil Procedure section 473.

Johnson Su asserts the judgment awarding plaintiff fees and costs should be reversed because it is based on the compromise and settlement agreement in the Alameda County case and that agreement was obtained through fraud and mistake. He contends that in the instant case, his former attorney, Mr. Kass, should have raised the issue of the mistake of his signing the agreement, should have had him rescind the agreement, and should have asserted the rescission in his answer and by way of cross-complaint. He asserts that when Kass did not litigate this case in such a manner, the trial court should have granted the motion for a new trial which his new attorney, Mr. Kennedy, filed. He contends the new trial motion should have been granted on the ground that Kass was incompetent, the incompetence rose to the level of positive misconduct, *and he (Johnson Su) could not have guarded against such incompetence*.

This argument does not fit the picture revealed by the record. In his own declaration, Johnson Su states that the day he signed the compromise and settlement agreement, January 22, 1999, he received a copy of it and read it when he got home. Upon reading it, he became "very concerned" and made an appointment with Mr. Kass for the end of that month, at which time Kass told him not to worry, Kass would take care of everything and secure a dismissal of him from the case. However, Kass's attempt to vacate the agreement came eight months later and was denied. Thus, Johnson Su was presented with two situations where his attorney did not litigate the Alameda County suit as Johnson Su believes it should have been litigated. According to Johnson Su's own declaration, in February 2000, after the instant case was filed, and after he never received the dismissal of the Alameda case that Kass kept telling him he would receive, he went to the Alameda County courthouse, obtained a copy of the reporter's transcript of the hearing at which Kass sought to have the Alameda court vacate the agreement, and discovered that he had actually signed the wrong settlement agreement.

Nevertheless, Johnson Su retained *the same attorney*, Mr. Kass, to handle the instant case and now claims that in the instant case he is the victim of the attorney's bad lawyering and ought to be given a new trial because he *could not* have guarded against such claimed incompetence. We find just the opposite. Given what plaintiff effectively asserts was repeated ineffective assistance of counsel in the original Alameda County case, he knew or had reason to know that a change of attorneys would be in his best interest and he *should have* guarded against negative litigation results in the instant case by retaining another attorney. According to the record, Johnson Su is a graduate of

Stanford University, worked as a civil engineer and computer project manager for the United States government, and has been a real estate broker for at least 17 years. Clearly he was competent to guard against further problems by retaining another attorney. Indeed, he was competent to read the compromise and settlement agreement prior to signing it yet he did not do so. Moreover, he has not advised this court why he was injured by signing the "wrong" agreement; he has not explained to this court why the "correct" agreement was preferable.[8]

3. *Johnson Su's Request for a Determination of the Scope of the Second Amended Judgment*

Johnson Su contends that papers filed by plaintiff subsequent to the trial court's filing of its second amended judgment show a need for this court to "determine the scope" of the second amended judgment. He cites plaintiff's demurrer to the complaint he filed in the new Alameda County suit concerning the 183 acres of land in Livermore,

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[8] Johnson Su has even claimed that he had nothing to do with the compromise and settlement agreement on which plaintiff based the instant case. He asserted at trial in this case that he was not even in court on the day that the contract attorney was sent by Mr. Kass to represent him, and he denied that he ever signed the compromise and settlement agreement.

He also asserts that Mr. Kass did not appear on the first day set for trial, July 9, 2001, because Kass "[took] the position that he had withdrawn." However, a review of the reporter's transcript for Monday July 9, 2001 shows that Kass indicated to the court, by telephonic appearance, that he (Kass) had checked the previous Friday with two clerks regarding the trial date and so he believed that trial was to start on the 12th and for that reason he was not in court on the 9th. These matters give support to the trial court's opinion that the defense presented in this case was not credible, and they make this court wonder whether our system of justice is not the real victim here.

and plaintiff's motion in the instant action to have him declared in contempt of such judgment for filing the new Alameda County suit.

The instant appeals were taken from the second amended final judgment. It would be premature for this court, in this opinion, to adjudicate the rights and wrongs of the parties' post-judgment litigation, and so we decline to do so.

4. *The Appeals of Timothy Su and John Su*

a. *Timothy Su*

Because Timothy Su's default has been taken, his appeal must be dismissed since he has no standing to appeal.[9] In his reply brief he asserts that he was not served with process. He points to (1) a copy of a status conference questionnaire for a *July 14, 2000* status conference wherein plaintiff's attorney, Maxwell Lin stated that Timothy Su had not yet been served, and (2) a copy of proof of service that was apparently submitted with plaintiff's request to have Timothy Su's default entered. The proof of service states that

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[9] We note that the trial court's May 29, 2003 ruling on pending motions states at page 2, fn. 1 that the defendants' defaults were not the result of their not filing an answer but rather were a discovery sanction whereby their answers were stricken. At least as to Timothy, this appears to be at odds with the request to enter his default that plaintiff submitted to the court.

Also, while the trial court stated in its ruling on pending motions that only defendant Johnson Su appeared for trial on July 10, 2001, the court later corrected this factual statement. In its June 11, 2003 minute order addressing *plaintiff's* request for clarification, the court stated that both Johnson Su and Daniel Su appeared for trial. Additionally, the reporter's transcript for the July 10, 2001 trial shows that attorney Bradley Kass appeared on that day on behalf of Johnson and Daniel Su, and further shows that both of those defendants were present for trial. And, in a motion filed by *plaintiff* in February 2003, plaintiff stated that both Johnson and Daniel Su appeared for trial. It is thus not clear to us why plaintiff states in its appellate brief that all named defendants, other than Johnson Su, defaulted in some manner.

on *June 20, 2000,* Timothy Su *was served* with the "summons and complaint, court notices, ADRP forms," by substitute service on defendant Daniel Su. Based on these papers, Timothy Su contends it is a lie that he was served. Assuming arguendo he was, in fact, not served, the record does not show that he moved to have his default set aside. In *Corona* v. *Lundigan* (1984) 158 Cal.App.3d 764, 766-767, the court stated that where a defaulting party has not moved in the trial court to set aside a default (which motion would enable the reviewing court to address the reason why the trial court entered the default), the only issues the defaulting party can raise on appeal are issues of jurisdiction and sufficiency of the pleadings. Obviously the trial court had jurisdiction, that is, subject matter jurisdiction, over this case.

As for the sufficiency of the pleadings to support the judgment, we observe that although the complaint *does not allege* that defendants have no relationship with LBC, the second amended final judgment nevertheless decrees that defendants "have no bona fide relationship whatsoever with LBC Development Corporation." However, we note also that Timothy Su does not elaborate in his briefs on how this discrepancy *prejudices him*, and indeed, he does not assert an interest in LBC. We further note that (a) the opening brief submitted by Johnson and Daniel Su in one of the earlier appeals (and upon which Timothy Su relies in this appeal), states that Johnson Su owned the 183 acres of land and deeded it to LBC and the stock of the corporation was owned by plaintiff and plaintiff's wife, and Johnson Su was the corporation's vice-president but was later terminated from that post, (b) such earlier brief does not mention that Timothy Su claims to have any interest in LBC, and (c) the trial court's ruling on pending motions in the

instant case states that even Johnson Su does not claim that he was ever a shareholder of LBC or that he paid for shares in LBC, and he really only claims that the corporation owes him money and therefore he has a beneficial ownership of such corporation. In short, Timothy Su does not make a case for prejudice from the statement in the second amended final judgment that the defendants have no bona fide relationship with LBC.[10]

b. *John Su*

The appeal of John Su must suffer the same fate as Timothy Su's appeal—dismissal—because the same default considerations apply to his status. While his reply

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[10] In its ruling on pending motions, the court explained why it ruled on defendants' relationship with LBC Development Corporation. The court stated: To afford full relief, to resolve all issues and prevent further problems under the settlement agreement and with respect to the trust deed interests in question, it was and is essential that the court, in granting declaratory relief, declare what the status of these parties were [sic] and are [sic] vis a vis one another and LBC in order to effectuate the relief sought overall through this complaint and through the prior action, culminating in the settlement agreement, and that, it act to ensure that, in keeping with the settlement terms, the order and judgment was [sic] broad enough to prevent and enjoin as necessary Johnson Su and his compatriots from continuing to 'mess up' the trust deed and the interests it reflects. Since Mr. Su has not been satisfied to simply directly 'attack' the trust deed by purporting through a fraudulently obtained signature of [plaintiff] and otherwise to change the beneficiary thereof, but has also determined, as reflected in these documents, to create continuing mischief by purportedly continuing to act as a Vice President of LBC, long after any such relationship had ceased to exist, and indirectly affect the trust documents by creating 'on behalf of LBC' new trustees and reconveyances, it was and is essential to the proper exercise of the court's equity powers that the declaration now be made and such conduct enjoined." The court also explained that it did not add LBC as an additional plaintiff in the case even though it believed it could have done during trial had one of the parties so requested. Additionally, the court stated that while plaintiff did not specifically ask for injunctive relief, a court under its equity powers can and should afford the relief necessary to resolve the issues in a case, and the court observed that in his prayer for relief in the complaint, plaintiff requested any and all other relief which the court believed appropriate in the case.

brief states he was not served with a summons and complaint, he does not cite to a motion to set aside his default. Moreover, the record contains his answer which he filed on July 11, 2000, and by which he, in effect, *brought himself into the suit* and waived any argument he might have regarding a lack of service of process. The record shows his default was entered on May 11, 2001, and apparently is the discovery sanction of which the trial court spoke. The above analysis regarding the sufficiency of the pleadings to support the second amended final judgment applies equally to John Su.

Additionally, although his briefs state he is appearing inpropria persona, his briefs have been submitted by another defendant, Johnson Su and are therefore improper and would not be considered in any event. A litigant cannot be represented by someone who is not an attorney, and there is no indication that Johnson Su is an attorney.

5. *Daniel Su's Appeal*

Like Timothy and John Su's briefs, only more so, Daniel Su's briefs are written in a disjointed, stream of consciousness manner, often devoid of citations to the record that actually support his assertions of procedure and fact. His assertions of insufficiency of the evidence to support plaintiff's position and the trial court's rulings do not amount to a proper sufficiency of the evidence attack. This type of briefing was addressed in footnote 3 of our opinion in case B154352, and this court has been charitable in its willingness to consider the inpropria persona appellants' briefs in this appeal, a gesture perhaps not likely to occur if similar briefs are filed by appellants in future appeals. Like Timothy and John Su's appellate presentation regarding ownership of LBC, Daniel Su's

presentation on that matter is insufficient to support a finding that the trial court's ruling is prejudicial to him.

DISPOSITION

The appeals of Timothy Su and John Su are dismissed. The judgment is affirmed. Costs on appeal to plaintiff.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

CROSKEY, J.

We Concur:

KLEIN, P.J.

KITCHING, J.